

1987

Post-submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of the Federal Rules of Criminal Procedure 23(b) and 24(c)

Joshua G. Grunat

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Joshua G. Grunat, *Post-submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of the Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 Fordham L. Rev. 861 (1987).
Available at: <https://ir.lawnet.fordham.edu/flr/vol55/iss5/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**POST-SUBMISSION SUBSTITUTION OF ALTERNATE
JURORS IN FEDERAL CRIMINAL CASES: EFFECTS
OF VIOLATIONS OF FEDERAL RULES
OF CRIMINAL PROCEDURE 23(b)
AND 24(c)**

INTRODUCTION

At common law, when a juror became incapacitated¹ or no longer qualified² to continue his service on the jury, the juror was discharged and a mistrial declared.³ This caused a substantial expenditure of prosecution, defense, and court resources.⁴ The Supreme Court and Congress⁵

1. A juror becomes incapacitated when, due to physical or mental illness, he is no longer able to continue his service as part of the jury. *See, e.g.,* United States v. Smith, 789 F.2d 196, 204 (3d Cir.) (juror discharged after being severely injured in automobile accident on fourth day of deliberations), *cert. denied*, 107 S. Ct. 668 (1986); Peek v. Kemp, 784 F.2d 1479, 1482 (11th Cir. 1986) (en banc) (juror discharged due to extreme nervousness); United States v. Meinster, 484 F. Supp. 442, 443 (S.D. Fla. 1980) (juror discharged when he suffered heart attack after four month RICO trial and a day and a half into deliberations), *aff'd sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B Dec. 1981), *cert. denied*, 457 U.S. 1136 (1982).

2. Courts find jurors not qualified when they appear to be unable to deliberate fairly. *See, e.g.,* United States v. Gambino, 788 F.2d 938, 947 (3d Cir.) (finding just cause to discharge juror who viewed potentially prejudicial document), *cert. denied*, 107 S. Ct. 98 (1986); United States v. Josefik, 753 F.2d 585, 587 (7th Cir.) (granting juror's request to be excused on discovering that she had difficulty hearing during trial, finding her unqualified to serve on jury), *cert. denied*, 471 U.S. 1055 (1985); United States v. Barker, 735 F.2d 1280, 1282 (11th Cir.) (discharging juror who, en route to deliberations, touched defendant's shoulder and smiled at him), *cert. denied*, 469 U.S. 933 (1984).

3. *See* LeRoy v. Phillips, 8 Ariz. App. 524, 525, 448 P.2d 94, 95 (1968); People v. Peete, 54 Cal. App. 333, 365, 202 P. 51, 65 (Cal. Dist. Ct. App. 1921); People v. Curran, 286 Ill. 302, 306, 121 N.E. 637, 638 (1918); Dennis v. State, 96 Miss. 96, 97, 50 So. 499, 500 (1909); State v. Dalton, 206 N.C. 507, 512, 174 S.E. 422, 425 (1934). *See generally* Note, *Federal Rules of Criminal Procedure 23(b) and 24(c): A Proposal to Reduce Mistrials Due to Incapacitated Jurors*, 31 Am. U. L. Rev. 651, 651 (1982) [hereinafter *Proposal to Reduce Mistrials*] ("At common law, when a juror in a criminal trial became incapacitated . . . the proper procedure was to declare a mistrial . . . by forming a new jury.").

4. *See* Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245 (1983) (to facilitate pinpoint citation, advisory committee's notes hereinafter will be cited in applicable volume of Federal Rules Decision). The Advisory Committee was particularly concerned with the situation that occurs when a lengthy trial had preceded the discharge of a juror. "[T]he remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources." *Id.* at 298.

Mistrials, and their consequent retrials, present society with costs inherent in trying the same case twice. In the analogous situation of grand jury privacy, the Supreme Court noted that retrials stemming from an invasion of that privacy necessarily result in substantial costs to society. *See* United States v. Mechanik, 106 S. Ct. 938, 942 (1986). A reversal of conviction would force "jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *Id.* Moreover, a retrial might "'reward the accused with complete freedom from prosecution,'" *id.* (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)), because the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Engle, 456 U.S. at 127-28.

5. The Supreme Court has the power to prescribe rules of procedure for the district courts. 18 U.S.C. § 3771 (1982). Before these rules are prescribed, Advisory Committees

addressed the problem of mistrials due to discharged jurors in Federal Rules of Criminal Procedure (Rule) 23(b)⁶ and 24(c).⁷

Rule 24(c) provides for the replacement of a regular juror by an alternate juror prior to the time the jury retires to consider its verdict.⁸ Once the jury retires, the alternate jurors must be discharged.⁹ If a regular juror must be discharged after submission of the case to the jury, the court is faced with the dilemma of how to proceed. As originally adopted,¹⁰ Rule 23(b) provided a limited solution to the post-submission discharged juror predicament. If both the prosecution and the defense agreed, with the court's approval, a valid verdict could be returned by the remaining jurors.¹¹

In 1983, the Supreme Court and Congress amended Rule 23(b)¹² to provide a broader solution.¹³ The current Rule permits the court, in its

study proposals and make recommendations on the proposed rules. See Warren, *Announcement of the Chief Justice of the United States VIII* (1960) in Federal Rules of Criminal Procedure (West 1986). These recommendations are received by the standing Committee on Rules of Practice and Procedure. The standing Committee then reports to the Judicial Conference of the United States. Once the Judicial Conference approves a proposed rule, it forwards its recommendations to the Supreme Court. The Court in turn will "approve, modify, or disapprove of the changes in the Federal Rules," and transmit any adopted changes to Congress. These adopted changes to the existing Rules "automatically become law in ninety days unless the Congress acts adversely." *Id.*

6. In the event of the post-submission discharge of a juror, Rule 23(b) now gives the trial judge the option to either continue with the remaining eleven jurors or declare a mistrial. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) ("it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors").

7. Rule 24(c) provides in pertinent part:

Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Fed. R. Crim. P. 24(c) (emphasis added).

8. *Id.*

9. *Id.*

10. Prior to its amendment in 1983, Rule 23(b) provided:

Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Fed. R. Crim. P. 23(b) (West 1982); see also Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 337 (1981) (setting forth then existing Rules and proposed changes).

11. See Fed. R. Crim. P. 23(b) (West 1982).

12. See 97 F.R.D. 245 (1983).

13. In discussing the problems associated with pre-amendment Rule 23(b), the Committee found the requirement of defendant's consent to be "most undesirable." *Id.* at 299-300. Thus, amended Rule 23(b) gives the trial court discretion to determine whether to grant a mistrial or allow deliberations to continue with the remaining 11 jurors. *Id.* at 301. The amended Rule provides that, absent a stipulation by the defendant, "in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." *Id.* at

discretion, to proceed with the remaining eleven jurors.¹⁴ Accordingly, the trial judge no longer needs the defendant's consent to avoid a mistrial.¹⁵

Despite the solution provided by original Rule 23(b), and the broader solution provided in its current version, some federal courts, when faced with post-submission juror discharge, continue to improvise their own procedures. Many courts permit substitution of an alternate juror for a discharged regular juror after submission of the case to the jury ("post-submission substitution").¹⁶ In preparation for a possible substitution, some courts send an alternate to sit in and observe the jury's deliberations¹⁷ ("sit-in").¹⁸ Other courts keep alternate jurors separately seques-

297-98. See *United States v. Smith*, 789 F.2d 196, 205 (3d Cir.) (amended Rule 23(b) provides a better solution for juror discharge than post-submission substitution), *cert. denied*, 107 S. Ct. 668 (1986); see also *infra* notes 59-67 and accompanying text (discussing constitutional and practical problems inherent in post-submission substitution).

14. The 1983 amendments to Fed. R. Crim. P. 23(b) added the following provision to the existing rule: "Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." Amendments to the Federal Rules of Criminal Procedure, 97 F.R.D. 245, 297-98 (1983).

15. See, e.g., *United States v. Smith*, 789 F.2d 196, 204-05 (3d Cir.) (amendment to Rule 23(b) gave court discretion to allow remaining eleven jurors to continue deliberations; prior to amendment, stipulation was required), *cert. denied*, 107 S. Ct. 668 (1986); *United States v. Gambino*, 788 F.2d 938, 949 (3d Cir.) (noting that Advisory Committee thought better solution was "to permit the judge, on his own motion, to proceed with a jury of eleven"), *cert. denied*, 107 S. Ct. 98 (1986); *United States v. Stratton*, 779 F.2d 820, 831 (2d Cir. 1985) (refusing defendant's request to adjourn for 4 days and proceeded with remaining jurors), *cert. denied*, 106 S. Ct. 2285 (1986).

16. "Post-submission substitution" describes the situation that arises when the trial court discharges a regular juror for cause after deliberations have begun. The court then substitutes an alternate juror for the discharged regular juror. See, e.g., *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (excusing juror with hearing problems and substituting an alternate), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Hillard*, 546 F. Supp. 1351, 1356 (S.D.N.Y. 1982) (substituting alternate juror for regular juror who became ill during deliberations), *aff'd*, 701 F.2d 1052, 1056 (2d Cir.) (referring to procedure of substituting an alternate juror after deliberations have begun as "post-submission substitution"), *cert. denied*, 461 U.S. 958 (1983).

17. See, e.g., *United States v. Jones*, 763 F.2d 518, 522 (2d Cir.) (trial judge instructed two alternates to "sit and listen to the jury's deliberations . . . emphasize[ing] that although the alternates could be present, they were not to participate"), *cert. denied*, 106 S. Ct. 386 (1985); *United States v. Allison*, 481 F.2d 468, 469 (5th Cir. 1973) (due to uncertainty of juror's ability to complete deliberations, trial court granted counsel's request to allow alternate to observe deliberation process; remand for hearing on prejudice to defendant); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 869-70 (4th Cir. 1964) (allowing alternate to remain with jury throughout deliberation process but instructing him not to participate).

18. The term "sit-in," as used in this Note, describes the procedure whereby a court allows an alternate juror to observe the deliberations, but admonishes him not to participate. The purpose of this procedure is to have a fully apprised alternate standing by in the event of juror discharge. See *La-tex Supply Co. v. Fruehauf Trailer Div.*, *Fruehauf Corp.*, 444 F.2d 1366, 1367 (5th Cir.) (noting possibility of need for substitution, trial court allowed alternate juror to sit in on deliberations but not participate), *cert. denied*, 404 U.S. 942 (1971).

tered from the regular jurors until the jury has reached a verdict.¹⁹

These judicially improvised procedures violate the plain language of Rule 24(c), which *requires* the discharge of alternate jurors after the jury retires to consider its verdict.²⁰ The federal courts of appeals are in conflict as to whether violations of Rule 24(c) require reversal in all cases.²¹ The Court of Appeals for the Fourth Circuit applies a rule of per se reversible error for all violations of Rule 24(c).²² Other courts of appeals require a showing that the defendant was prejudiced by the post-submission use of an alternate juror before ordering a reversal.²³

19. In this procedure the alternate jurors remain apart from the regular jurors at all times to prevent communication between them. See *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.) (three alternates were assigned separate marshalls, separate rooms and transported in separate vehicles), *cert. denied*, 393 U.S. 961 (1968).

20. Rule 24(c) provides in part: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Fed. R. Crim. P. 24(c).

Courts have construed the language of Rule 24(c)—requiring discharge of the alternate jurors after the jury retires—as mandatory. See, e.g., *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) (Rule 24(c) is mandatory and does not contemplate post-submission substitution); *United States v. Phillips*, 664 F.2d 971, 994 (5th Cir. Unit B Dec. 1981) (requirement in Rule 24(c) is mandatory and should be followed), *cert. denied*, 457 U.S. 1136 (1982); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870-71 (4th Cir. 1964) (in this sit-in case, the court reversed, finding that language of Rule 24(c) is both explicit and binding on trial judge); see also 8A J. Moore, *Moore's Federal Practice* ¶ 24.06, at 24-97 (2d ed. 1985) ("The fourth sentence of Rule 24(c) clearly requires that alternate jurors be discharged after the start of jury deliberations."); 2 C. Wright, *Federal Practice and Procedure* § 388, at 390 (Criminal 2d ed. 1982) (Rule 24(c) "states in mandatory terms" that courts are required to discharge alternate jurors after jury retires).

21. Compare *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) (violations of Rules 23(b) and 24(c) are per se plain error) (citing *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964)) and *United States v. Beasley*, 464 F.2d 468, 470-71 (10th Cir. 1972) (holding that once jury began its separate function as "the jury," an alternate's presence necessitates mistrial) with *United States v. Reed*, 790 F.2d 208, 210 (2d Cir.) (Rule 24(c) violations do not "require reversal per se absent a showing of prejudice"), *cert. denied*, 107 S. Ct. 445 (1986) and *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) ("only prejudicial violations of [Rule 24(c)] are reversible errors"), *cert. denied*, 471 U.S. 1055 (1985) and *Martin v. United States*, 691 F.2d 1235, 1238 (8th Cir. 1982) (trial court refused to reverse, citing lack of prejudice to defendant), *cert. denied*, 459 U.S. 1211 (1983) and *United States v. Kopituk*, 690 F.2d 1289, 1311 (11th Cir. 1982) (holding that extraordinary precautions must be taken to insure that defendant is not prejudiced by post-submission substitution), *cert. denied*, 463 U.S. 1209 (1983).

22. See *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) (reading *Virginia Erection* as establishing rule of per se error); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964) (Federal Rules of Criminal Procedure "have the force and effect of law and are binding on District Judges").

The Court of Appeals for the Tenth Circuit treats violations of Rule 24(c) similarly to the Fourth Circuit. In *United States v. Beasley*, the court held that once the jury begins its separate function as "the jury," an alternate's presence would necessitate a mistrial. 464 F.2d 468, 470-71 (10th Cir. 1972). But see *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) (characterizing *Beasley* holding as plain error rule but rejecting it in favor of prejudice to defendant test).

23. See, e.g., *United States v. Jones*, 763 F.2d 518, 523 (2d Cir.) (showing of prejudice required for reversal), *cert. denied*, 106 S. Ct. 386 (1985); *United States v. Barker*, 735 F.2d 1280, 1282 (11th Cir.) (post-submission substitution not reversible error unless de-

This Note argues that the defendant's substantial rights are affected whenever the judicially improvised procedure involves post-submission personal contact between the alternate and regular jurors. Part I of this Note presents an overview of a defendant's constitutional right to trial by jury. Part II discusses the development of the jury trial right under the Rules. Part III analyzes the effects of judicial improvisations that stem from the reluctance of trial courts to declare mistrials after the post-submission discharge of a juror. This Note concludes that when the judicially improvised procedure results in post-submission contact between an alternate juror and the regular jurors, reversal should be required. When no such contact occurs, the procedure used amounts to nothing more than harmless error.

I. CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The common law right of a criminal defendant to trial by jury²⁴ is guaranteed in the United States Constitution.²⁵ In interpreting the jury trial right, the Supreme Court originally held that the words "jury" and "trial by jury," as used in the Constitution, have the same meaning as at common law.²⁶ For a jury to be constitutional, therefore, it had to consist "of twelve persons, neither more nor less."²⁷ Prior to 1970, the Court reaffirmed that twelve-member juries were constitutionally mandated in federal criminal cases.²⁸

In *Williams v. Florida*,²⁹ however, the Supreme Court held that only those features essential to the common law jury's purpose are preserved in the Constitution.³⁰ The Court found that one essential feature is the

defendant prejudiced), *cert. denied*, 469 U.S. 933 (1984); *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) (decisions requiring reversal only on some showing of prejudice are better reasoned than those supporting rule of per se plain-error).

24. See, e.g., *Williams v. Florida*, 399 U.S. 78, 87 (1970) (long history of right to trial by jury); *Thompson v. Utah*, 170 U.S. 343, 349-50 (1898) ("Those who emigrated to this country from England brought with them this great [common law right to jury trial] . . ."); see also *Duncan v. Louisiana*, 391 U.S. 145, 151-55 (1968) (tracing history of jury trial right); 3 L. Orfield, *Orfield's Criminal Procedure under the Federal Rules* § 23:2, at 4-5 (2d ed. 1986) (jury trial right has "traditionally been one of the most important rights of the criminal defendant").

25. See *Lockhart v. McCree*, 106 S. Ct. 1758, 1765 (1986) (jury trial right guarantees defendant an impartial jury); *Duncan v. Louisiana* 391 U.S. 145, 153 (1968) (right to jury trial in criminal cases is "fundamental to our system of justice"); U.S. Const. art. III, § 2, cl. 3 ("[t]he trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); U.S. Const. amend. VI (guarantee of trial by impartial jury). See generally, 3 L. Orfield, *supra* note 24, § 23:2, at 4-5 (setting out constitutional right to trial by jury as implemented in Federal Rules of Criminal Procedure).

26. See *Thompson v. Utah*, 170 U.S. 343, 350 (1898). The *Thompson* Court traced the right to twelve-member juries back to the Magna Charta and English common law. *Id.* at 349-50.

27. *Id.* at 349.

28. See *Stewart v. United States*, 366 U.S. 1, 10 (1961); *Patton v. United States*, 281 U.S. 276, 292 (1930).

29. 399 U.S. 78 (1970).

30. *Id.* at 99-100.

"commonsense judgment of a group of laymen," free from outside influences.³¹ Noting that the number twelve was merely an historical accident of no great significance,³² the Court stated that considerations of jury size are left to Congress.³³ Thus, a jury in federal criminal cases, contrary to the earlier Supreme Court decisions,³⁴ no longer must be made up of twelve persons to pass constitutional muster.³⁵

Lower courts have explained further the essential features of the jury. They have held that to facilitate constitutionally required jury impartiality, courts should protect the privacy and secrecy of jury deliberations.³⁶ In addition, it is essential that the law zealously protect the jury's sanctity by keeping it free from intentional unauthorized intrusions.³⁷ Further, each juror must be able to act with the independence and freedom of action requisite to a fair trial.³⁸

Within these constitutional parameters, the Supreme Court and Congress have addressed jury procedure in the Rules³⁹ by providing for

31. *Id.* at 100.

32. The Court concluded "the fact that the jury at common law was composed of precisely 12 is a historical accident . . . wholly without significance 'except to mystics.'" *Id.* at 102 (quoting in part *Duncan v. Louisiana*, 391 U.S. 145, 182 (1968) (Harlan, J., dissenting)).

33. *Williams v. Florida*, 399 U.S. 78, 103 (1970).

34. See *supra* notes 26-28 and accompanying text.

35. Twelve-man jury "is not a necessary ingredient of 'trial by jury.'" See *Williams v. Florida*, 399 U.S. 78, 86 (1970).

36. See *United States v. Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) (deliberations kept private to ensure that jury's judgment is "not affected by outside influences"); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964) ("cardinal principle that the deliberations of the jury shall remain private and secret in every case").

37. See *Remmer v. United States*, 350 U.S. 377 (1956). In *Remmer*, a juror was improperly approached by an outsider who offered him money for a favorable verdict. The Court ordered a new trial and held "it is the law's objective to guard jealously the sanctity of the jury's right to operate [free] from outside unauthorized intrusions purposefully made." *Id.* at 382.

Federal Rule of Evidence 606(b) sets the boundaries for authorized intrusions into the jury. The Rule specifically prohibits a juror from testifying about his mental processes in reaching a verdict. See Fed. R. Evid. 606(b). A juror may, however, testify as to whether any "extraneous prejudicial information was improperly brought to the jury's attention" Fed. R. Evid. 606(b).

For example, in *Marshall v. United States*, 360 U.S. 310 (1959), the Supreme Court implicitly approved questioning jurors to determine whether they have been exposed to prejudicial information. *Id.* at 312. In *Marshall*, the jury viewed two newspaper accounts of the defendant's prior criminal record. *Id.* at 311-12. This information was ruled inadmissible at trial. *Id.* at 312. The Supreme Court based its reversal of the conviction on the exposure of the jury to this prejudicial information. *Id.* at 312-13.

Thus, although juries are to be kept free from outside influences, in limited circumstances, evidentiary hearings to determine prejudice may be necessary to protect a defendant's right to a fair trial. See *infra* notes 114-19.

38. See *Arizona v. Washington*, 434 U.S. 497, 510-12 (1978) (upholding declaration of mistrial stemming from improper argument by counsel noting that each juror must be capable of exercising that freedom and independence of action requisite to a fair trial).

39. See Fed. R. Crim. P. 23 ("Trial by Jury or by the Court"); Fed. R. Crim. P. 24 ("Trial Jurors").

twelve-member juries as the national norm.⁴⁰

II. THE JURY TRIAL RIGHT UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rules 23(b) and 24(c): The Problem of Post-Submission Discharge Prior to the 1983 Amendments

As originally enacted, Rules 23(b)⁴¹ and 24(c)⁴² presented courts with "a most difficult issue concerning the fair and efficient administration of justice."⁴³ Absent the defendant's consent, cases of post-submission juror disqualification or incapacitation necessarily would end in mistrials.⁴⁴ These mistrials were mandated both at common law⁴⁵ and by the interaction of pre-amendment Rules 23(b) and 24(c).⁴⁶

The option of forcing a mistrial not only was costly and time consuming,⁴⁷ but it also gave the defendant a tactical advantage.⁴⁸ These con-

40. Rule 23(b) provides that unless a juror is discharged for cause "[j]uries shall be of 12." Fed. R. Crim. P. 23(b). See *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.) ("federal rules of criminal procedure establish juries of twelve as the national norm"), *cert. denied*, 107 S. Ct. 445 (1986).

41. See 5 F.R.D. 573, 593; see also Federal Rules of Criminal Procedure 40-41 (N.Y.U. School of Law 1946) (original Rule 23(b)); *supra* note 10.

42. See 5 F.R.D. 573, 594; see also Federal Rules of Criminal Procedure 42-43 (N.Y.U. School of Law 1946) (original Rule 24(c)).

43. Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298 (1983).

44. In light of the requirement in pre-amendment Rule 23(b) for defendant's consent to a jury of less than twelve, the interaction between Rules 23(b) and 24(c) mandated a mistrial if defendant would not agree to continue. See *infra* note 46 and accompanying text; cf. *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir.) (Rule 24(c) limits time period in which regular juror may be replaced "to the period prior to the commencement of deliberations"), *cert. denied*, 461 U.S. 958 (1983).

45. See *LeRoy v. Phillips*, 8 Ariz. App. 524, 525, 448 P.2d 94, 95 (1968); *People v. Peete*, 54 Cal. App. 333, 365, 202 P. 51, 65 (Cal. Dist. Ct. App. 1921); *People v. Curran*, 286 Ill. 302, 306, 121 N.E. 637, 638 (1918); *Dennis v. State*, 96 Miss. 96, 97, 50 So. 499, 500 (1909); *State v. Dalton*, 206 N.C. 507, 512, 174 S.E. 422, 425 (1934). See generally *Proposal to Reduce Mistrials*, *supra* note 3, at 651 (discussing common law rule requiring mistrial).

46. See *United States v. Gambino*, 788 F.2d 938, 948 (3d Cir.) ("the interaction between [pre-amendment] Rules 23(b) and 24(c) enabled defendants to force a mistrial" in cases of post-submission juror discharge), *cert. denied*, 107 S. Ct. 98 (1986).

47. See *United States v. Mechanik*, 106 S. Ct. 938, 942 (1986). According to the Court, retrials result in substantial costs to society: "it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy and other resources to repeat a trial that has already once taken place." *Id.*; see also Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298 (1983). A mistrial would "necessitate a second expenditure of substantial prosecution, defense and court resources." *Id.* In addition, these mistrials affect the court's ability to satisfy the "speedy trial" rights of others. *Id.* at 300.

48. Defendant will not stipulate to a jury of less than twelve "in any case in which defense counsel believe some tactical advantage will be gained by retrial." Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 299 (1983). Tactical advantages include witnesses' fading memories, unavailability of witnesses and other time related factors, thereby making retrial almost impossible. See *United States v. Mechanik*, 106 S. Ct. 938, 942 (1986); *United States v. MacDonald*, 435 U.S. 850, 853-54, 862 (1978); *Abney v.*

cerns prompted courts to improvise their own procedures in cases of post-submission juror discharge.⁴⁹

B. *Proposed Amendments to Rules 23 and 24*

The proposed amendments to Rules 23 and 24 were designed to cure the evil of forced mistrials caused by the post-submission discharge of a juror.⁵⁰ Providing guidance in this area was consistent with the intent of the Rules to aid in establishing simple and uniform federal criminal procedures.⁵¹ In the event of post-submission discharge of a regular juror, the proposed amendment to Rule 23 gave the court discretion to accept a verdict by the remaining eleven jurors.⁵² This proposal abolished the need for the defendant's consent,⁵³ thereby stripping him of his tactical advantage.⁵⁴ The Supreme Court adopted this proposal and amended

United States, 431 U.S. 651, 657 (1977); *DiBella v. United States*, 369 U.S. 121, 126 (1962).

49. Two procedures frequently used are post-submission substitution and sit-in. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 299-301 (1983); *supra* notes 16-18 and accompanying text; see, e.g., *United States v. Reed*, 790 F.2d 208, 209 (2d Cir.) (trial court allowed alternate to retire with jury and "participate in the verdict since he had 'stuck through' " long trial), *cert. denied*, 107 S. Ct. 445 (1986); *United States v. Jones*, 763 F.2d 518, 522-23 (2d Cir.) (trial judge permitted two alternates to sit in on jury's deliberations), *cert. denied*, 106 S. Ct. 386 (1985); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (court substituted alternate after nine-minute deliberation had taken place), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Phillips*, 664 F.2d 971, 990-91 (5th Cir. Unit B Dec. 1981) (over objection by defense counsel, court substituted alternate after 12 hours of deliberation), *cert. denied*, 457 U.S. 1136 (1982); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 869-70 (4th Cir. 1964) (trial court permitted alternate to retire with jury but not participate in deliberations).

50. See *United States v. Stratton*, 779 F.2d 820, 831 (2d Cir. 1985) (amendment to Rule 23(b) was "prompted by the dilemma" of forced mistrials due to post-submission juror discharge), *cert. denied*, 106 S. Ct. 2285 (1986); see also Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, advisory committee's note, 91 F.R.D. 289, 338, 343-44 (1981) (Advisory Committee established that "it is essential that there be available a course of action other than mistrial").

The Advisory Committee noted that it was understandable that trial courts used post-submission substitution as a mechanism to avoid mistrials. The preferred change in the Federal Rules, however, is to give the trial court discretion to allow deliberations to continue with the remaining eleven jurors. *Id.* at 338-40.

51. See Fed. R. Crim. P. 2 (providing for simplicity in federal criminal procedure); Clark, *Foreword* to Federal Rules of Criminal Procedure at iv (N.Y.U. School of Law 1946) (Rules "are the essence of brevity, simplicity and uniformity"); see also *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.) ("it is desirable that there be consistency in the method of jury selection throughout the federal court system"), *cert. denied*, 107 S. Ct. 445 (1986); *United States v. Viserto*, 596 F.2d 531, 540 (2d Cir.) (consistency in method of discharging alternate jurors is "desirable in the interest of stability and uniformity"), *cert. denied*, 444 U.S. 841 (1979); *infra* note 68 and accompanying text (discussing Fed. R. Crim. P. 2).

52. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 337-38 (1981).

53. The proposed rule provided for a discretionary verdict by eleven jurors without the defendant's consent. *Id.*

54. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, advisory committee's note, 91 F.R.D. 289, 339 (1981).

Rule 23(b).⁵⁵

The proposed amendment to Rule 24, on the other hand, provided for the post-submission substitution procedure.⁵⁶ A similar proposal was rejected by the drafters of the original rules.⁵⁷ After careful consideration⁵⁸ of both the constitutional and policy implications of the proposed amendments,⁵⁹ the Advisory Committee rejected post-submission substi-

55. See 97 F.R.D. 245 (1983).

56. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 341-43 (1981) (proposal deleted provision requiring discharge of alternates when jury retires and added subdivision (d) that provided for post-submission substitution).

57. Rule 24, the trial juror rule, developed after the Judicial Conference Committee circulated a series of drafts for comment. See Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 44-54 (1962). An early draft provided for post-submission substitution of an alternate juror for a discharged regular juror. See *id.* at 45-47; see also *State v. Lehman*, 108 Wis. 2d 291, 309 n.14, 321 N.W.2d 212, 221 n.14 (1982) (discussing an early draft of Rules that provided for post-submission substitution that was later rejected) (citing Orfield, *supra*, at 46). In its comments on one of the drafts, however, the Supreme Court questioned whether the drafters of the Rules had addressed adequately whether the substitution procedure was desirable and constitutional. See Orfield, *supra* at 46. The Court asked the Committee if it "satisfied itself that it is desirable or constitutional that an alternate may be substituted after the jury has retired and begun its deliberation." *Id.* In apparent response to the Court's concerns, the drafters removed the post-submission substitution provision. *Id.* at 47. The final form of the rule on alternate jurors did not provide for post-submission substitution. See Federal Rules of Criminal Procedure 42-43 (N.Y.U. School of Law 1946) (Rule 24(c) provided in part that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict"); see also Orfield, *supra*, at 50 (rule adopted did not provide for post-submission substitution). Thus, an alternate juror may not participate in deliberations unless he has been substituted for a regular juror before the jury retires. This version of "[t]he original Rules of Criminal Procedure . . . [was] transmitted to the Congress by the Attorney General on January 3, 1945 and became effective on March 21, 1946." 18 U.S.C. app. 556 Historical Note (1982). See Clark, *Foreword* to Federal Rules of Criminal Procedure at xx-xxi (N.Y.U. School of Law 1946) (Federal Rules of Criminal Procedure were transmitted by Supreme Court to Attorney General on Dec. 26, 1944, who in turn submitted them to Congress on Jan. 3, 1945).

58. Post-submission substitution was considered and rejected when the Federal Rules of Criminal Procedure were originally drafted. See *supra* note 57. The procedure was again considered and rejected when the 1983 amendment to Rule 23(b) was being studied. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298-301 (1983). In addition, rejection of post-submission substitution as a remedy for the discharged juror problem represents the "national consensus of bench and bar." *United States v. Viserto*, 596 F.2d 531, 540 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979). See generally Warren, *Announcement of the Chief Justice of the United States* (1960) in Federal Rules of Criminal Procedure, VII-VIII (West 1986) (rules and amendments should be continuously studied by representatives of judiciary, bar, and by legal scholars).

59. See Fed. R. Crim. P. 23(b) advisory committee's note, 91 F.R.D. 289, 340-41 (1981) (constitutional difficulties with fifth amendment due process and sixth amendment right to trial by jury, practical difficulties include: no way to nullify effects of prior deliberations, possible violations of jury privacy and coercive effect on alternate).

The Committee also noted that its rejection of post-submission substitution was in accord with the judgment of most commentators. See *id.* at 340; C. Wright, *supra* note 20, § 388, at 393 (doubts expressed about constitutionality and desirability of post-submission substitution "are as forceful now as they were when [the Supreme Court] first voiced" them).

tution in favor of the discretionary eleven-member jury verdict provided by proposed Rule 23(b).⁶⁰ Thus, Rule 24(c) retained the provision requiring the discharge of alternate jurors after the jury retires.⁶¹

Although the Committee appreciated that trial judges would seek to avoid costly mistrials,⁶² it found that providing for a discretionary verdict with only eleven jurors was much less objectionable than allowing post-submission substitution.⁶³ Post-submission substitution requires that an alternate either sit in on the jury's deliberations or participate in the deliberations even though he was not present during the earlier jury discussions.⁶⁴ Sit-in procedures violate the privacy and secrecy of the jury.⁶⁵ The inherent coercive effect of either procedure on an alternate might affect his decision-making process.⁶⁶ In addition, the regular jurors cannot nullify the effects of the prior deliberations on their ultimate decision.⁶⁷ The Committee thus rejected this proposal to amend Rule 24 and adopted the amendment to Rule 23 in its stead.

C. *Procedural Considerations: Violations of the Federal Rules*

The Federal Rules of Criminal Procedure are intended to provide for

60. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 300 (1983). The Advisory Committee rejected the proposed amendment to Rule 24(c) that would have provided for post-submission substitution. See *United States v. Gambino*, 788 F.2d 938, 948 (3d Cir.), *cert. denied*, 107 S.Ct. 98 (1986). It was preferable to allow an eleven-member jury rather than to provide for post-submission substitution. See 2 C. Wright, *Federal Practice and Procedure* § 388, at 42 (Criminal 2d ed. Supp. 1986).

61. See *supra* note 57.

62. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 299-300 (1983) (Committee found it understandable for trial judge to elect post-submission substitution rather than declare a mistrial).

63. The Committee noted that it is "far better to permit the deliberations to continue with a jury of 11 than to make a [post-submission] substitution." *Id.* at 300.

64. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 340 (1981) (quoting 2 C. Wright, *supra* note 20 § 388, at 392-93).

65. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 341 (1981) (sit-in procedure violates "the cardinal principle that the deliberations of the jury shall remain private and secret in every case") (quoting *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)); see also *United States v. Levesque*, 681 F.2d 75, 81 (1st Cir.) (in dicta, court noted that in sit-in cases, alternate's presence would destroy jury's sanctity), *cert. denied*, 459 U.S. 1089 (1982); *United States v. Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) (alternate's inadvertent "presence in the jury room . . . was undeniably an intrusion into the sanctity of the jury"); *United States v. Beasley*, 464 F.2d 468, 470 (10th Cir. 1972) (presence of alternate in jury room violated the "cardinal principle" of jury secrecy) (quoting *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). But see *Johnson v. Duckworth*, 650 F.2d 122, 124-25 (7th Cir.) (per curiam) (substitution by sit-in alternate "quite practical and not constitutionally improper," noting that alternates are not same as other strangers to jury), *cert denied*, 454 U.S. 867 (1981).

66. See *infra* notes 122-33 and accompanying text (discussing inherent coercive effect of substitution procedure on substituted alternate jurors).

67. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) (even if reconstituted jury was instructed to begin anew, original jurors would be influenced by first deliberations).

simplicity in procedure and fairness in the administration of justice.⁶⁸ Ad hoc deviations from the procedures chosen by the Supreme Court and Congress may impinge on these goals.⁶⁹ Nevertheless, some courts do not always adhere to the Rules.⁷⁰ The Supreme Court addressed this problem by furnishing a standard to review such judicial departures.⁷¹

Rules 52(a) and 57 codify the standard of review of judicial departures from the Rules. Rule 52(a) requires that any deviation from the Rules must affect the defendant's substantial rights before reversal is proper.⁷² This Rule has been interpreted as rendering harmless any error that does not influence the jury's decision.⁷³ In addition, Rule 57 permits courts to improvise local procedures provided they are not inconsistent with the Federal Rules.⁷⁴

The Supreme Court has considered the proper treatment to accord judicial departures from the Rules. In *Fallen v. United States*,⁷⁵ the Court stated that the Federal Rules of Criminal Procedure were never meant to be an unbending code.⁷⁶ Courts examining deviations from the Rules,

68. See Fed. R. Crim. P. 2 ("[t]hese rules . . . shall be construed to secure simplicity in procedure [and] fairness in administration").

69. Many courts find consistency in procedure to be a desirable end product of adherence to rules of procedure. See *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.), *cert. denied*, 107 S. Ct. 445 (1986); *United States v. Viserto*, 596 F.2d 531, 540 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979); *cf. State v. Lehman*, 108 Wis. 2d 291, 313, 321 N.W.2d 212, 223 (1982) (analyzing state statute regulating jury procedure, noting that whether to allow post-submission substitution is a policy consideration that "should not be made by [the courts] on a case-by-case basis").

70. See, e.g., *United States v. Reed*, 790 F.2d 208, 209 (2d Cir.) (alternate allowed to participate in deliberations since he 'stuck through' long trial), *cert. denied*, 107 S. Ct. 445 (1986); a *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (trial judge excused juror with hearing problems, then recalled and substituted alternate who had already been discharged), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Allison*, 481 F.2d 468, 469 (5th Cir. 1973) (trial court allowed alternate to observe deliberations).

71. See Fed. R. Crim. P. 52(a) (harmless error); Fed. R. Crim. P. 57 (district courts may "regulate their practice in any manner not inconsistent with [the Rules] . . ."); see also *supra* note 5 (discussing Supreme Court's authority to promulgate rules of procedure).

72. Rule 52(a) provides in part: "Any error . . . which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52(a). See Fed. R. Crim. P. 52(a) advisory committee's note (West 1986) (Rule 52(a) restates existing law that provides for disregard of "technical errors . . . which do not affect the [defendant's] substantial rights") (citation omitted) (quoting 28 U.S.C. former § 391).

73. See *Chapman v. California*, 386 U.S. 18, 22-24 (1967); see also *United States v. Ong*, 541 F.2d 331, 338 (2d Cir. 1976) (affirming conviction despite possible erroneous admission of evidence noting that error is harmless unless it affects jury's verdict), *cert. denied*, 430 U.S. 934 (1977); *Loftis v. Beto*, 450 F.2d 599, 601-02 (5th Cir. 1971) (prejudicial information heard by jury was harmless error because evidence properly received left no room for jury to find any reasonable doubt as to guilt).

74. Rule 57 provides in pertinent part that: district courts may "regulate their practice in any manner not inconsistent with [the Federal Rules of Criminal Procedure]." Fed. R. Crim. P. 57.

75. 378 U.S. 139 (1964).

76. "[T]he Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Id.* at 142.

therefore, must consider the circumstances in each case.⁷⁷ The focal point of this consideration must be the effect the deviation had on the defendant's substantial rights. Thus, deviations from the Rules trigger a determination of what effect that deviation had on the defendants' substantial rights.⁷⁸

III. THE EFFECT OF JUDICIAL DEPARTURES FROM FEDERAL RULES OF CRIMINAL PROCEDURE 23(B) AND 24(C)

Despite the solution authorized by Rules 23(b) and 24(c), some courts continue to improvise local procedures.⁷⁹ To analyze the cases that address judicial departures from Rules 23(b) and 24(c), it is helpful to divide them into two fact patterns.⁸⁰ The first group of cases involves post-submission contact between an alternate juror and the regular jurors ("contact cases").⁸¹ The second group involves no contact between an alternate and the regular jurors ("no-contact cases").⁸²

A. Case Classifications

1. Contact Cases

Cases involving post-submission contact may be subdivided into three procedural classifications. First, the trial judge may permit an alternate

77. *See id.*

78. *See supra* notes 71-73 and accompanying text.

79. *See supra* notes 16-19 and accompanying text.

80. The two groups utilized in this analysis make no reference to waivability of the defendant's right to a jury trial, both constitutional and under the Rules. The standard for waiver of the defendant's jury trial right under the Rules presents another area of conflict in the courts of appeals. Many of the courts discussed in Part III partially base their holdings on defendant's waiver of his right to jury trial. The standard for waiver of these rights is a separate issue in conflict and beyond the scope of this Note. *Compare* *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870 (4th Cir. 1964) (requiring defendant's personal assent to waiver) *with* *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985) (waiver by counsel is sufficient), *cert. denied*, 471 U.S. 1055 (1985). Although this conflict has been noticed by Supreme Court, it has denied certiorari. *See* *United States v. Reed*, 790 F.2d 208 (2d Cir.), *cert. denied*, 107 S. Ct. 445 (1986) (White, J., dissenting).

81. The contact cases arise when there has been personal contact between an alternate juror and the regular jurors after the jury has retired for deliberation. This usually occurs either where the court sends an alternate to observe the deliberations or substitutes him for a discharged regular juror. *See infra* notes 83-86 and accompanying text.

82. The no-contact cases occur when a trial judge keeps one or more alternate jurors separately sequestered from the regular jury. In this manner, the court insures that no personal contact occurs between the regular jurors and an alternate. *See infra* notes 87-90 and accompanying text.

A recent example of a no-contact case occurred in *United States v. Badalamenti*, 84 Crim. 236 (PNL) (E.D.N.Y. 1987) (popularly known as the "pizza connection" drug trial). Although no written opinion has been rendered in the case as of this publication, the relevant facts were set forth in a recent newspaper article. *See N.Y. Times*, Feb. 28, 1986, at 35, col. 6. During deliberations, a juror was excused from further service because of threats to her family. Although there were still three alternates sequestered, the court elected to proceed with the remaining eleven jurors, despite defendants' objections. *Id.*

to be substituted for a discharged regular juror after deliberations have begun.⁸³ Second, the trial court, in anticipation of post-submission substitution, may use the sit-in procedure, thereby permitting an alternate to observe the deliberations of the regular jurors.⁸⁴ Finally, the trial court may inadvertently send an alternate to retire with the full complement of regular jurors.⁸⁵

All three of these procedures create an opportunity for the alternate and regular jurors to communicate with each other.

2. No-Contact Cases

The cases that involve no post-submission contact between the regular jurors and an alternate usually arise out of the trial judge's concerns that a regular juror may be unable to complete his service on the jury.⁸⁶ In preparation for this, the trial judge violates the express provision of Rule 24(c)⁸⁷ by keeping one or more alternate jurors either on call⁸⁸ or sequestered from the regular jurors.⁸⁹

Once the deliberations begin, separate sequestration ensures that the alternate jurors do not communicate with the regular jurors. In contrast to the contact cases, the alternate never joins the regular jury.

83. See, e.g., *Peek v. Kemp*, 784 F.2d 1479, 1482 (11th Cir. 1986) (en banc); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.), cert. denied, 471 U.S. 1055 (1985); *United States v. Barker*, 735 F.2d 1280, 1282 (11th Cir.), cert. denied, 469 U.S. 933 (1984).

84. See, e.g., *United States v. Jones*, 763 F.2d 518, 522 (2d Cir.), cert. denied, 106 S. Ct. 386 (1985); *United States v. Virginia Erection Corp.*, 335 F.2d 868, 869 (4th Cir. 1964).

85. See, e.g., *United States v. Watson*, 669 F.2d 1374, 1389 (11th Cir. 1982) (alternate who inadvertently was permitted to retire with jury was elected foreman); *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) (alternate retired with jury and went unnoticed for forty-five minutes); *United States v. Beasley*, 464 F.2d 468, 469 (10th Cir. 1972) (alternate participated in jury's election of foreman and voted to break for lunch before court realized that alternate had not been discharged).

86. See *Leser v. United States*, 358 F.2d 313, 314-15 (9th Cir. 1966) (in light of juror's commitment to undergo serious surgery, trial court retained alternate in violation of Rule 24(c)); see also *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.) (discussing Government's brief, court acknowledged that "this procedure presents counsel with the choice of consenting to a substitution if one of the regular jurors [becomes] disqualified" but held that this is no reason to violate Rules), cert. denied, 393 U.S. 961 (1968).

87. See Fed. R. Crim. P. 24(c). The Rule mandates that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." (emphasis added); see also *supra* notes 7-9 and accompanying text.

88. See *United States v. Lamb*, 529 F.2d 1153, 1154-55 (9th Cir. 1975) (trial judge instructed alternate juror to "stand-by" in case needed).

89. See, e.g., *United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1984) (alternate jurors kept separately sequestered); *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.) (three alternates kept separately sequestered), cert. denied, 393 U.S. 961 (1968); see also *United States v. Badalamenti*, 84 Crim. 236 (PNL) (E.D.N.Y. 1987), discussed in, *N.Y. Times*, Feb. 28, 1986 at 35, col. 6 (three alternate jurors remained available after a day and one-half of deliberations).

B. *Application of the Constitution and Federal Rules to the Post-Submission Contact Cases*

In post-submission contact cases,⁹⁰ the Court of Appeals for the Fourth Circuit follows a per se rule of reversible error.⁹¹ Other courts, however, require a showing that the defendant has been prejudiced by such contact.⁹² Constitutional and legislative considerations, however, mandate reversal in all cases of post-submission contact because the defendant's right to trial by an impartial jury is endangered.

For a variety of reasons, courts that require a showing of prejudice to the defendant find neither prejudice nor any violations of the defendants' constitutional rights by the post-submission contact.⁹³ Noting that Rule 24(c) is not constitutionally mandated,⁹⁴ many of these courts find any prejudice to the defendant to be speculative.⁹⁵ Courts departing from the Rules support this finding by comparing the amount of time taken for the second deliberation period with the first. Provided that sufficient time is spent for the second deliberation period, in comparison to the first, courts conclude that the defendant was convicted after a full and fair deliberation.⁹⁶ In addition, these courts generally rely on curative in-

90. See *supra* note 19 and accompanying text (defining post-submission contact).

91. See *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978) (reading *United States v. Virginia Election Corp.*, 335 F.2d 868 (4th Cir. 1964) to establish "a per se rule of plain error").

92. See, e.g., *United States v. Jones*, 763 F.2d 518, 523 (2d Cir.) (reversal for violations of Rule 24(c) requires showing of prejudice), *cert. denied*, 106 S. Ct. 386 (1985); *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982) (appropriate standard for reversal is prejudice to defendant), *cert. denied*, 463 U.S. 1209 (1983); *United States v. Phillips*, 664 F.2d 971, 995-96 (5th Cir. Unit B Dec. 1981) (new trial not warranted because safeguards utilized by trial court minimized danger of undue prejudice), *cert. denied*, 457 U.S. 1136 (1982).

93. See, e.g., *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982) (holding post-submission substitution is not constitutional violation when properly qualified alternate participates fully in all deliberations leading to verdict), *cert. denied*, 463 U.S. 1209 (1983); *United States v. Phillips*, 664 F.2d 971, 992-93 (5th Cir. Unit B Dec. 1981) (post-submission substitution not deprivation of defendant's constitutional rights), *cert. denied*, 457 U.S. 1136 (1982).

94. See *United States v. Phillips*, 664 F.2d 971, 992-93 (5th Cir. Unit B Dec. 1981) (constitutional right to trial by jury is not violated by post-submission substitution of qualified alternate that "fully participates in all of the deliberations which lead to a verdict." (quoting *People v. Collins*, 17 Cal. 3d 687, 693, 552 P.2d 742, 746, 131 Cal. Rptr. 782, 786 (1976), *cert. denied*, 429 U.S. 1077 (1977))), *cert. denied*, 457 U.S. 1136 (1982).

95. See *United States v. Meinster*, 484 F. Supp. 442, 444 (S.D. Fla. 1980), *aff'd sub nom. United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B Dec. 1981), *cert. denied*, 457 U.S. 1136 (1982); *accord United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979). But see *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975). The *Lamb* court reversed the conviction, see *id.* at 1157, noting the short duration of the second deliberation period in comparison to the first. See *id.* at 1156. In a footnote, however, the court stated that the length of the second deliberation period was irrelevant in the face of a violation of the express language of Rule 24(c). See *id.* at 1156 n.7.

96. See, e.g., *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (finding initial nine-minute deliberation not critical to reconstituted jury's verdict), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir.) (length of jury's second

structions to reduce substantially or eliminate any prejudice to the defendant.⁹⁷ Moreover, by questioning all of the jurors regarding their ability to begin deliberations anew, with an open mind, the trial judge seeks to satisfy the constitutional requirement of jury impartiality.⁹⁸

The following analysis demonstrates that in all contact cases the defendant is prejudiced and a new trial should be granted. Moreover, sit-in and post-submission substitution procedures are contrary to the procedural choice of the Supreme Court and Congress. No-contact cases, however, present mere technical violations of the Rules and do not affect substantial rights of the defendant. Accordingly, departures from the Rules in the no-contact cases should be treated as harmless error.

1. Deference to the Procedural Choices Embodied in the Rules

Courts that refuse to reverse in post-submission contact cases do not give sufficient weight to the procedures selected by the Supreme Court and Congress, codified in Rules 23 and 24.⁹⁹ In *Williams v. Florida*,¹⁰⁰ the Supreme Court expressly held that considerations bearing on the desirability of a twelve-member jury in federal criminal trials are left to Congress.¹⁰¹ Congress, in turn, granted procedural rule-making author-

deliberation period added further support to finding that defendants were not prejudiced), *cert. denied*, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971, 996 (5th Cir. Unit B Dec. 1981) (second deliberation, lasting for six days, contributed to negation of any coercive effect on alternate), *cert. denied*, 457 U.S. 1136 (1982).

97. Courts rely on curative instructions for violations of Rule 24(c) by both sit-in procedures and post-submission substitution.

An example of the sit-in procedure may be found in *United States v. Jones*, 763 F.2d 518 (2d Cir.), *cert. denied*, 106 S. Ct. 386 (1985). The *Jones* court permitted an alternate to sit in on the deliberations of the jury until it was brought to its attention that the procedure is impermissible. *See id.* at 521-22. The court then removed the alternate and instructed the jury to begin its deliberations anew. *See id.* at 522. It further instructed the jury to disregard any participation by the alternate in the prior deliberations. *See id.* at 523.

A court utilizing the post-submission substitution procedure similarly relied on curative instructions. The trial court questioned each juror whether "he or she could wipe from his or her mind the [previous] deliberations." *United States v. Phillips*, 664 F.2d 971, 991 (5th Cir. Unit B Dec. 1981), *cert. denied*, 457 U.S. 1136 (1982). After ascertaining that the jury could deliberate impartially, the court instructed the jury to "start [its deliberations] fresh and anew." *Id.*

Another court using post-submission substitution "repeatedly emphasized that the jurors were duty-bound to begin their deliberations afresh." *United States v. Kopituk*, 690 F.2d 1289, 1307 (11th Cir. 1982). *See also United States v. Hillard*, 701 F.2d 1052, 1057-60 (2d Cir.) (because trial court instructed jury to begin anew, court of appeals found that "careful instruction and supervision from the trial court" sufficiently minimized any danger stemming from substitution), *cert. denied*, 461 U.S. 958 (1983).

98. In *United States v. Barker*, 735 F.2d 1280 (11th Cir.), *cert. denied*, 469 U.S. 933 (1984), the Court of Appeals for the Eleventh Circuit noted that after a thorough examination of the jurors, the trial judge ascertained that each juror could deliberate impartially. *Id.* at 1282-83. The trial court then instructed the reconstituted jury to begin their deliberations anew. *Id.* at 1283.

99. *See supra* notes 24-40 and accompanying text.

100. 399 U.S. 78 (1970).

101. *Id.* at 103; *see United States v. Stratton*, 779 F.2d 820, 831 (2d Cir. 1985) (noting

ity to the Supreme Court.¹⁰² Through this rule-making process the Federal Rules of Criminal Procedure established a twelve-member jury as the national norm for federal criminal cases.¹⁰³ Rules 23 and 24, the jury procedure rules, are phrased in express, unambiguous language that is frequently interpreted as mandatory.¹⁰⁴

Deviations from Rules 23 and 24 by the lower courts demonstrates a refusal¹⁰⁵ to adhere to a recently amended rule of procedure that expressly governs the use of alternate jurors.¹⁰⁶ Indeed, these courts circumvent the Rules by using procedures expressly rejected by both the original drafters¹⁰⁷ and the Advisory Committee.¹⁰⁸

2. Sanctity of the Jury

Differing judicial views of an alternate's role¹⁰⁹ contribute to the conflict in the courts over the effect of substitution on the defendant's substantial rights. The issue concerns the policy of keeping jury deliberations private. If an alternate no longer has legal standing as a

that considerations of jury size were expressly left to Congress) (citing *Williams v. Florida*, 399 U.S. 78, 103 (1970)), *cert. denied*, 106 S. Ct. 2285 (1986).

102. 18 U.S.C. § 3771 (1982).

103. *See* Fed. R. Crim. P. 23(b); *see also* *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.) ("federal rules of criminal procedure establish juries of twelve as the national norm"), *cert. denied*, 107 S. Ct. 445 (1986); *United States v. Viserto*, 596 F.2d 531, 540 (2d Cir.), *cert. denied*, 444 U.S. 841 (1979) (Rules provide solution that represents "national consensus of bench and bar").

104. *See* *United States v. Hillard*, 701 F.2d 1052, 1058 (2d Cir.) (Rule 24(c) is mandatory), *cert. denied*, 461 U.S. 958 (1983); *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982) (post-submission substitution is inconsistent with mandatory Rules 23(b) and 24(c)); *see also* *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (policy and language of Rule 24(c) prohibits post-submission substitution), *cert. denied*, 471 U.S. 1055 (1985).

105. *See, e.g.,* *United States v. Josefik*, 753 F.2d 585, 587, 589 (7th Cir.) (affirming conviction despite stating that substitution of alternate juror is prohibited by policy and language of federal rules), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Hillard*, 701 F.2d 1052, 1058, 1064 (2d Cir.) (affirming conviction despite characterizing language in Rule 24(c) as mandatory), *cert. denied*, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971, 994 (5th Cir. Unit B Dec. 1981) (affirming conviction but admitting that "Rule 24(c) has been held by [the Fifth Circuit] to be 'a mandatory [rule] that should be scrupulously followed'" (quoting *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973))), *cert. denied*, 457 U.S. 1136 (1982). *But see* *United States v. Virginia Erection Corp.*, 335 F.2d 868, 870, 873 (4th Cir. 1964) (reversing defendant's conviction holding that Federal Rules of Criminal Procedure "have the force and effect of law and are binding on District Judges").

106. *See supra* notes 16-19 and accompanying text.

107. *See supra* note 57 and accompanying text.

108. *See supra* notes 58-67 and accompanying text.

109. *Compare* *United States v. Allison*, 481 F.2d 468, 470 (5th Cir. 1973) ("In no sense did [the alternate] have standing as a member of the jury.") *and* *United States v. Virginia Erection Corp.*, 335 F.2d 868, 871 (4th Cir. 1964) ("It is certain that the alternate . . . had no legal standing as a juror.") *with* *Johnson v. Duckworth*, 650 F.2d 122, 125 & n.7 (7th Cir.) (per curiam) (although alternate's presence under state's sit-in procedure invades jury's privacy, alternates are not same as "[o]ther 'strangers' to the regular jury . . ."), *cert. denied*, 454 U.S. 867 (1981).

juror once the jury retires to consider its verdict, it necessarily follows that the alternate's presence in the jury room violates the privacy and sanctity of the jury's deliberations.¹¹⁰

Maintaining jury privacy is essential to keeping jury verdicts free from the effects of outside influences.¹¹¹ Even if the alternate obeys all instructions to remain silent and not participate in the deliberations, his attitude towards the defendant can be conveyed to the regular jurors through gestures, facial expressions and the like.¹¹² Jurors are asked to determine the credibility of a witness, using both verbal and non-verbal means.¹¹³ Similarly, an alternate juror's non-verbal communication may affect the decision-making processes of the regular jurors.

Some courts require an evidentiary hearing to determine if the alternate's presence has prejudiced the defendant.¹¹⁴ These hearings, however, may constitute a second invasion of the jury's sanctity.¹¹⁵ Regular use of evidentiary hearings may stifle the jury's debate.¹¹⁶ In addition, jurors who expect their deliberations to be examined may be pressured into reaching popular verdicts.¹¹⁷ Thus, strict guidelines for questioning jurors have been established.¹¹⁸ The need to ensure a just determination of every action,¹¹⁹ can be met by limiting inquiries into the jury to uncovering events that have improperly influenced the jury's verdict, without delving into the jurors' mental processes.¹²⁰

110. The alternate's presence during deliberations "violate[s] the cardinal principle that the deliberations of the jury shall remain private and secret." *Virginia Election*, 335 F.2d at 872. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) (quoting *Virginia Election*, at 872).

111. Once the jury retires, the alternate is considered to be just like any other outsider to the jury's deliberations. See *supra* note 37 and accompanying text.

112. See *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964) (alternate's attitude, "conveyed by facial expressions, gestures or the like," might affect jury's decision).

113. In *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952), Judge Learned Hand stated that witnesses' "carriage, behavior, bearing, manner and appearance" are part of the evidence. *Id.* at 268-69. In addition, a jury should "take into consideration the whole nexus of sense impressions which they get from a witness." *Id.* at 269.

114. See *United States v. Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982); *United States v. Allison*, 481 F.2d 468, 472-73 (5th Cir. 1973).

115. *United States v. Beasley*, 464 F.2d 468, 470 (10th Cir. 1972) (evidentiary hearings are themselves "dangerous intrusion[s] into the proceedings of the jury").

116. Jury debate may be stifled if a juror is concerned with future exposure of the deliberations. See Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886, 889 (1983) (quoting *Clark v. United States*, 289 U.S. 1, 13 (1933)).

117. There are serious concerns with post-verdict juror interviews whether they are conducted by the litigants, their attorneys or the court. See *id.* at 888. These intrusions into the jury may affect "fairness to future litigants and the stability and public acceptance of verdicts." *Id.* at 889. In addition, jurors might feel pressured into reaching popular verdicts. *Id.* at 890.

118. See Fed. R. Evid. 606(b).

119. See 3 J. Weinstein, *Weinstein's Evidence* ¶ 606[03], at 606-23 (1985).

120. See *id.*; see also *supra* note 37 and accompanying text (discussing Federal Rule of Evidence 606(b) and its regulation of propriety of post-verdict juror testimony); S.

3. Sixth Amendment Right to an Impartial Jury

The sixth amendment guarantees criminal defendants the right to be tried by an impartial jury¹²¹ that is free from outside influences.¹²² Any post-submission contact, therefore, endangers the impartiality of the jury.

When an alternate juror joins a jury that has already begun deliberating and that is favorably disposed to a guilty verdict, there is an "inherent coercive effect" on him to agree prematurely with the regular jurors.¹²³ Psychological research demonstrates that new group members are "unable to change the traditions" of an established group.¹²⁴ Moreover, one study shows that an individual facing a group consensus may surrender his own factually correct perceptions in favor of the incorrect group conclusion.¹²⁵ This willingness to conform to the group supports

Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 448, 448-64 (4th ed. 1986) (same).

121. The sixth amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. Const. amend. VI.

122. See *supra* note 31 and accompanying text.

123. See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) ("[t]he inherent coercive effect upon an alternate who joins a jury that has . . . already agreed that the accused is guilty is substantial"); see also Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) (central difficulty with post-submission substitution is that "the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the [other jurors]").

124. Note, *Criminal Procedure—Jury Trial—Rule 24(c) of the Federal Rules of Criminal Procedure Requires Discharge of Alternate Juror When Jury Acts As Separate Entity*, 19 Wayne L. Rev. 1605, 1614 n.57 (1973) [hereinafter *When Alternate Jurors Act as Separate Entity*]; see Merei, *Group Leadership and Institutionalization*, in 2 *Human Relations* 23 (1949). In a study of groups of children, an assembly of children was considered a "group" once it developed lasting rules and traditions. *Id.* at 23. Next, a child that had previously exhibited leadership qualities (age, giving orders to other children, aggressiveness, etc.) was placed with the established group. *Id.* at 24. Although the new "leader" made his personality known to the other group members, in all of the experimental groups, "the group absorb[ed] the leader, forcing its traditions on him." *Id.* at 25. Moreover, the leader remained unsuccessful in gaining acceptance of his original ideas. *Id.*; see also J. Freedman, J. Carlsmith & D. Sears, *Social Psychology* 157-58 (1970) (discussing Merei's study showing that newcomers have difficult time changing traditions of an established group).

For an application of this study to jurors, see Note, *When Alternate Jurors Act as Separate Entity*, *supra*, at 1614 n.57 (substituted alternate is less effective than regular juror in determining outcome of deliberations).

125. See Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, 2 *Readings in Social Psychology* 2 (1952).

This study involved an experiment that placed an individual in a position that "radically conflicted" with that of the control group. *Id.* at 3. Each group, consisting of 8 male college students, "was instructed to judge a series of simple, clearly structured perceptual relations." *Id.* The group members were instructed to announce their perceptions to the rest of the group. Seven of the 8 group members were part of the control group and were secretly instructed to answer incorrectly on 12 of the 18 samples. On these 12 occasions, the 8th group member ("subject") was faced with a situation where each member of the control group announced an answer that was contrary to the objective facts but in agreement with the other members of the control group. *Id.* at 3-4.

the theory that the alternate juror's inability to hold his own with the original jurors frustrates jury impartiality.

*Peek v. Kemp*¹²⁶ illustrates the inherent coercive effect that may arise from the post-submission substitution procedure.¹²⁷ In *Peek*, the defendant received the death penalty after being tried and convicted of murder. After one full day of trial, the jury retired to deliberate at ten p.m. After midnight, the foreman requested fifteen more minutes to deliberate,¹²⁸ an indication that the jury was close to a verdict.¹²⁹ A short time later, the foreman returned and requested that the court excuse a juror who seemed mentally unstable.¹³⁰ Subsequent fact findings showed that this juror had been the lone holdout for acquittal.¹³¹ Without questioning him, the trial judge dismissed the juror and substituted an alternate in his place.¹³² The reconstituted jury convicted the defendant almost immediately.¹³³ The Court of Appeals for the Eleventh Circuit, en banc, affirmed the district court's denial of habeas relief.¹³⁴

In addition to the inherent coercive effect, whenever an alternate who does not sit in is substituted after deliberations have begun, he has missed part of the deliberative process.¹³⁵ The remaining original jurors are cog-

Next, it was the subject's turn to announce his answer. Many of the subjects conformed their opinion to the incorrect group opinion. *Id.* at 10.

Applying this study to post-submission substitution, it follows that an alternate juror who enters the deliberations after the regular jurors have formed a strong basis for opinion could be pressured into adopting the opinions of the regular jurors as his own. *See* H. Kalven & H. Zeisel, *The American Jury* 462-63 (1966) (applying Asch's study to jury study).

126. *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986) (en banc). Although *Peek* concerned a juror substitution pursuant to Georgia state law, *see id.* at 1483, the decision is relevant here for its consideration of the effect of such substitution on continuing jury deliberations.

127. Two dissenting judges noted that the proper course to follow was to declare a mistrial in cases of post-submission juror discharge. A mistrial would alleviate "the significant risk that a verdict would [result] 'from pressures inherent in the situation rather than the considered judgment of all the jurors.'" *Id.* at 1507 (Johnson, Clark, J.J., dissenting) (quoting *Arizona v. Washington* 434 U.S. 497, 509 (1978)).

128. *Peek*, 784 F.2d at 1482.

129. *See id.* at 1506 (Johnson, Clark, J.J., dissenting).

130. *See id.* at 1482.

131. *See id.*

132. *Id.*

133. There was a conflict in the record over how much time actually passed before the reconstituted jury reached its verdict. The trial transcript indicated that it took only three minutes for the second jury to convict the defendant. The testimony of the jury foreman and both attorneys, however, indicated that the actual time of deliberations was between fifteen and thirty minutes. *Id.* at 1482 n.2.

134. *See id.* at 1495. The court based its holding on a finding of no prejudice to the defendant. *See id.* at 1484. The procedure used by this court, post-submission substitution, involves personal contact between the remaining regular jurors and an alternate. Such contact, however, is always prejudicial to a criminal defendant. *See supra* note 133 and *infra* notes 135-44 and accompanying text.

135. *See Hameed v. Jones*, 750 F.2d 154, 161 (2d Cir. 1984) (an alternate who is substituted after submission would miss "the discussion and consideration that have previously taken place"), *cert. denied*, 105 S. Ct. 2677 (1985).

nizant of each other's outlooks and positions,¹³⁶ as well as those of the discharged regular juror,¹³⁷ while the alternate does not have the benefit of the previous discussions.¹³⁸

In cases of post-submission substitution, the discharged juror's statements and opinions are no longer a proper basis for the jury's verdict.¹³⁹ Many courts rely on curative instructions to eliminate any prejudice to the defendant,¹⁴⁰ but fail to acknowledge that curative instructions simply may not be effective.¹⁴¹ In rejecting post-submission substitution, the Advisory Committee noted that even if the reconstituted jury was required to review the prior deliberations, it seems likely that the continuing jurors would be unable to nullify the effects of the prior

136. See *People v. Ryan*, 19 N.Y.2d 100, 103, 224 N.E.2d 710, 712, 278 N.Y.S.2d 199, 202 (1966) (each remaining original juror would be cognizant of positions and outlooks of others); *State v. Lehman*, 108 Wis.2d 291, 308, 321 N.W.2d 212, 220 (1982) ("The eleven regular jurors will have formed views without the benefit of the views of the alternate juror, and the alternate . . . will participate without the benefit of the prior group discussion.").

137. See *Lehman*, 108 Wis.2d at 308, 321 N.W.2d at 220.

138. "[I]t is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion." 3 A.B.A. Standards for Criminal Justice § 15-2.7 commentary at 15.74 (2d ed. 1980). The Advisory Committee agreed with this rationale. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 300-01 (1983).

139. See, e.g., *United States v. Hillard*, 701 F.2d 1052, 1056-57 (2d Cir.) (finding essential feature of jury to be preserved through trial court's instructions to begin deliberations anew and its explanation that "a jury verdict must be the product of the deliberations of all twelve people who reach that verdict"), *cert. denied*, 461 U.S. 958 (1983); *United States v. Phillips*, 664 F.2d 971, 991 (5th Cir. Unit B Dec. 1981) (discussing trial court's questioning of each juror to ascertain whether "he or she could . . . wipe from his or her mind the deliberations of the two previous days and start fresh and anew"), *cert. denied*, 457 U.S. 1136 (1982); see also Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 301 (1983) (committee found central difficulty with post-submission substitution to be that "it still seems likely that the continuing jurors would be influenced by the earlier deliberations").

140. See, e.g., *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir.) (judge instructed jury to begin deliberations anew), *cert. denied*, 471 U.S. 1055 (1985); *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir.) (same), *cert. denied*, 469 U.S. 933 (1984); *United States v. Phillips*, 664 F.2d 971, 991 (5th Cir. Unit B Dec. 1981) (same), *cert. denied*, 457 U.S. 1136 (1982).

141. Cf. *Arizona v. Washington*, 434 U.S. 497, 513 (1978) (noting that curative instructions "will not necessarily remove the risk of bias that may be created by improper argument").

Similarly, when an alternate is substituted and the regular jurors' opinions have been swayed by pre-substitution argument, people cannot easily forget argument once heard. See *Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (reversing defendant's conviction because jury viewed newspaper containing prejudicial information, despite jurors' assurances that they could deliberate fairly); *Simmons v. United States*, 142 U.S. 148, 155 (1891) (declaring mistrial when jury was exposed to newspaper article noting that "it [would be] impossible for that jury . . . to act with the independence and freedom on the part of each juror requisite to a fair trial"); see also *Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., dissenting) ("[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring))).

deliberations.¹⁴² As a result, the defendant may be convicted by the twelve people in the jury room, plus the judgments and insights of the discharged juror.

Post-submission substitution also is objectionable because it decreases the probability of a hung jury. The probability of a hung jury increases when a lone juror, who votes for acquittal, gets early support in the voting.¹⁴³ If substitution were permissible, members of the regular jury may try to influence a lone holdout juror to feign illness and thereby place the burden of decision on an alternate.¹⁴⁴ Thus, a substituted alternate, who also votes for acquittal, may not be afforded an opportunity for early support of his position, thereby lessening the defendant's chances of obtaining a mistrial.¹⁴⁵

142. See Fed. R. Crim. P. 23(b) advisory committee's note, 97 F.R.D. 245, 298-301 (1983).

143. A statistical jury study supports the theory that "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations." H. Kalven & H. Zeisel, *supra* note 124, at 462-63. This conclusion is based on psychological research that shows that an individual group member will disbelieve "his own correct observation" where he is the only member of the group to hold this opinion. To remain firm in his convictions, "it is necessary for him to have at least one ally." *Id.* at 463.

In addition, a psychological study has shown that, while a new group member will conform his opinion to that of the existing group, despite objective evidence to the contrary, when the new member gets support from even one other group member, the likelihood of his conforming to the group's opinion diminishes significantly. See Asch, *supra* note 124, at 7-10.

The Supreme Court has characterized the study provided by Kalven and Zeisel as "the most ambitious empirical study of jury behavior that has been attempted." *Spencer v. Texas*, 385 U.S. 554, 575 (1967). See *United States v. Stratton*, 779 F.2d 820, 834 n.15 (2d Cir. 1985) (refusing defendant's request for post-submission substitution, court upheld use of eleven-member juries as provided in Rule 23(b) citing jury study provided by Kalven and Zeisel.), *cert. denied*, 106 S. Ct. 2285 (1986).

144. See *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975) (a holdout juror could be under pressure to "feign illness . . . to place the burden of decision on an alternate juror."); see also C. Wright, *supra* note 20, at 393 n.27 (citing *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1978)); cf. *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir.) (regular jurors might disable dissenter by pressuring him into agreeing with rest of jury's thinking), *cert. denied*, 461 U.S. 958 (1983); *State v. Lehman*, 108 Wis.2d 291, 310, 321 N.W.2d 212, 221 (1982) (discussing state statute requiring discharge of alternates after submission of case, court noted that juror "might be coerced into feigning incapacity in order to be relieved of sitting on the jury" if substitution were permissible).

145. The following hypothetical illustrates this lost opportunity for early support. After several days of deliberations the jury is deadlocked 11 to 1. One juror becomes seriously ill and must be discharged. This discharged juror happens to be the lone holdout. An alternate juror, who holds the same views as the discharged juror is then substituted. Because this alternate had no allies in the early voting, however, he concludes that he must be mistaken and gives up his position, agreeing with the majority. Were this to happen, the defendant would be deprived of his "right to a mistrial if the original jury could not reach agreement." *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir. 1975). See H. Kalven, & H. Zeisel, *supra* note 124, at 463.

*C. Application of the Constitution and Federal Rules
to No-Contact Cases*

In contrast to the contact cases, procedures that do not involve post-submission contact do not affect any substantial rights of the defendant.

Keeping an alternate separately sequestered does not affect jury privacy.¹⁴⁶ Because the alternate never joins the regular jury's deliberations,¹⁴⁷ the jury's impartiality also remains intact.¹⁴⁸ Further, even if the sequestered alternate juror was considered part of the jury, this procedure would not violate the Constitution as the Supreme Court has established that a twelve-person jury is not constitutionally mandated.¹⁴⁹ Thus, failure to discharge the alternate jurors in violation of Rule 24(c), by itself, would not be violative of the Constitution.

Rule 52(a) provides that Rule violations not affecting a defendant's substantial rights shall be ignored.¹⁵⁰ A separately sequestered alternate juror who has no post-submission contact with the jury could not possibly affect the jury's decision making process. Thus, a defendant's substantial right to a jury trial is not affected by the procedure. The error is harmless and should be ignored.

Conclusion

In the event of post-submission juror discharge, Rule 23(b) gives trial courts the discretion to proceed with the remaining eleven jurors. Some courts deviate from this procedural guideline and establish their own procedures.

In the contact cases, the contact between an alternate and the regular jurors risks affecting the decision-making processes of the jury. Such contact violates the defendant's constitutional right to trial by an impartial jury.

The Supreme Court has twice rejected a proposed rule that would have provided for post-submission substitution. Lower courts should not improvise their own procedures that contravene the express decision of the

146. When an alternate juror is separately sequestered, he has no personal contact with the regular jurors. Without personal contact, it is not possible for the alternate to affect the decision-making processes of the jury. See *United States v. Rubio*, 727 F.2d 786, 799 n.7 (9th Cir. 1984) (alternate separately sequestered with separate marshalls so that no contact occurred between the alternate and regular jurors; court noted that "reversal would be pointless where there is no reasonable possibility that the alternate jurors . . . affected the verdict.").

147. *Id.*

148. In the no-contact cases, there can be no effect on the jury's ability to act with independence and freedom. Moreover, the alternate jurors are never in a position to influence the jury's deliberations. See *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.) (finding that separately sequestered alternates were not in position to influence jury's deliberations), *cert. denied*, 393 U.S. 961 (1968).

149. See *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (noting in dicta that proof of case would be more compelling had jury consisted of more than 12 jurors); see also *supra* notes 24-35 and accompanying text.

150. See Fed. R. Crim. P. 52(a).

Supreme Court and Congress, particularly where the impact of this ad hoc rulemaking has a potentially devastating effect on a defendant's sixth amendment right to a fair and impartial jury. In addition, judicial improvisations on the rules of procedure promulgated by the Supreme Court conflict with the uniformity and simplicity goals behind the Federal Rules. Because post-submission substitution and sit-in procedures affect the defendant's substantial right to trial by an impartial jury, use of these procedures should constitute reversible error.

In cases that do not involve post-submission contact between an alternate and the regular jurors, however, there is no possibility that the local procedure affected the jury's verdict. Thus, the substantial rights of the defendants are not affected and verdicts should not be disturbed.

Joshua G. Grunat

